

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY DWAYNE SIMMONS,

Defendant-Appellant.

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UNPUBLISHED

March 16, 2006

No. 258964

Macomb Circuit Court

LC No. 03-004086-FC

Before: Neff, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of armed robbery, MCL 750.529, felonious assault, MCL 750.82, carrying or possessing a firearm during the commission of a felony (felony-firearm), MCL 750.227b, failure to stop at the signal of a police officer (fleeing and eluding) in the fourth degree, MCL 257.602(a)(2), and assaulting, resisting, and obstructing a police officer in the course of duty, MCL 750.81(d)(1). We vacate defendant's conviction and sentence for felonious assault and affirm in all other respects. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that his armed robbery and felonious assault convictions and sentences violate double jeopardy, and the prosecution concedes the issue. Here, defendant's actions constituting felonious assault and armed robbery are nearly indistinguishable. Defendant raised his gun to Jerome Wilson's head while simultaneously threatening Wilson and demanding his wallet and phone. Immediately after, Wilson gave defendant his wallet and phone, which defendant took while still pointing the gun at Wilson. Thus, a felonious assault continued throughout the time defendant robbed Wilson with a gun. Accordingly, we vacate defendant's felonious assault conviction and sentence. See *People v Herron*, 464 Mich 593, 609; 628 NW2d 528 (2001) (remedy where multiple punishments violate double jeopardy is to affirm the greater offense and vacate the lower conviction); *People v Yarbrough*, 107 Mich App 332, 334-336; 309 NW2d 602 (1981).

Defendant next argues that the evidence was insufficient to support his felony-firearm conviction because not only was Wilson's description of the gun inadequate, but also no gun was recovered. We disagree. When reviewing a claim of insufficient evidence, this Court reviews the record de novo in the light most favorable to the prosecution. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). The Court does not consider whether any evidence existed that could support a conviction, but rather, must determine whether a rational trier of fact could find

that the evidence proved the essential elements of the crime beyond a reasonable doubt. Regarding the offense at issue, to commit felony-firearm, a defendant must possess a firearm during the commission or attempted commission of a felony. MCL 750.227b; *Id.*

In the instant case, sufficient evidence existed to support defendant's conviction of felony-firearm. Wilson stated plainly at trial that defendant had a gun, threatened to shoot him, and took his wallet and phone. Furthermore, Wilson had taken a gun class and owned a gun prior to the incident, and was able to describe with specificity defendant's gun.

That the police did not recover a gun or Wilson's wallet or phone does not mean the evidence was insufficient to support a conviction. Given that police could not see defendant at all times because defendant ran between buildings and through a cluttered alley, it is just as plausible that the police did not recover a gun because it was nearly impossible to find under those circumstances. In addition, even though defendant offered the theory that he was on his way to find cough syrup for his daughter, Warren Police Officer Cortland Larry did not recall seeing cough syrup in defendant's car during his inventory search. Defendant's mere theory of innocence is alone not enough to render the evidence insufficient upon review because this Court must resolve any potential evidentiary conflict in the prosecution's favor. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Thus, viewing the evidence in the light most favorable to the prosecution, a reasonable jury could find beyond a reasonable doubt that defendant possessed a firearm while committing a felony.

We vacate defendant's felonious assault conviction and sentence, and affirm in all other respects.

/s/ Janet T. Neff  
/s/ Henry William Saad  
/s/ Richard A. Bandstra